APR 18 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 1136

JENNIE HERZIG, as Administratrix of the goods, chattels and credits of Herman Weintraub, deceased,

Respondent,

against

SWIFT & Co.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, AND BRIEF IN SUPPORT THEREOF

HAROLD R. MEDINA,
Counsel for Petitioner.

GEORGE J. STACY,
JOSEPH KANE,
of Counsel.

INDEX

PAGE

PETITION:

Summary Statement of Matters Involved 2

Reasons for Granting Writ 4

BRIEF:

Opinions Below 7

Jurisdiction 7

Statement of the Case 8

Assignments of Error 10

POINT I—The Circuit Court of Appeals should have reviewed the amount of the District Court judgment which clearly exceeds the limitation provided by the Florida law. The right and power of the Circuit Court of Appeals to make such review where a limitation provided by law has been exceeded is of great importance and frequently exercised. The omission to do so here should be reviewed by this Court 11

POINT II—The verdict and judgments of the District Court and the Circuit Court of Appeals are contrary to the law of Florida 13

POINT III—There was a departure from the usual course of judicial proceedings by the District Court 15

POINT IV—The Circuit Court of Appeals erred in its decision as to the charge of the District Court 16

CONCLUSION 17

CASES CITED

PAGE

Atlantic Coast v. Woods, 110 Fla. 147 (148 So. 542) 13

Co-operatives v. Shields, 71 Fla. 110 (70 So. 924) 16

Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474 ..... 11, 12

Foster v. Thornton, 125 Fla. 699 (170 So. 459) 13

Florida East Coast RR. Co. v. Hayes, 67 Fla. 101, 105 (64 So. 504) 13, 14

Glenwood Irr. Co. v. Vallery, 284 Fed. 483 12

Herring v. Luckenbach SS. Co., Inc., 137 F. (2d) 598 11

International Shoe v. Hewitt, 123 Fla. 587 (167 So. 7) 13, 14

Jacksonville v. Bowden, 54 Fla. 461 (45 So. 755) 13

Marianna v. Blountstown, 83 Fla. 542 (91 So. 553) 13

Moore v. Atlantic Coast Line R.R. Co. (C. C. A. 2), decided February 21, 1946 3

New York v. Thierer, 221 Fed. 571 16

Paine v. St. Paul Union Stockyards Co., 35 F. (2d) 624 12

Pugh v. Bluff City Excursion Co., 177 Fed. 399 12

Reisberg v. Walters, 111 F. (2d) 595 ..... 3, 11

Rydell v. Greenhut, 140 App. Div. (N. Y.) 926 16

Union Bus Co. v. Smith, 104 Fla. 569 (140 So. 631) 13

Wayne v. N. Y. Life Insurance Co., 132 F. (2d) 28, 37 11

STATUTES CITED

	PAGE
Florida Statutes:	
Section 4960 (now 7047)	8
Section 4961 (now 7048)	8
U. S. Code, Title 28, Section 347	7

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner was defendant in an action brought under Florida law to recover for death of Herman Weintraub through alleged negligence of defendant.

The action was brought in the New York Supreme Court, Kings County, and was removed to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship. There was a verdict, after trial, for respondent for $20,000, which said District Court refused to set aside (R. pp. 279-281), and entered judgment on June 29, 1945, for $20,171.50 (R. p. 282). This was affirmed upon appeal by the United States Circuit Court of Appeals for the Second Circuit, which entered judgment of affirmance thereon on March 15, 1946 (R. p. 291). Petitioner now prays that a writ of certiorari issue directed to said Honorable United States Circuit Court of Appeals for the Second Circuit to review said judgment of affirmance.

Summary Statement of Matters Involved

This action was brought under the Florida statutes allowing a recovery in the event of death, under a provision whereby an action may be brought by an administrator where there are no dependents (R. p. 5). It is the well-settled Florida law that in such an action the recovery is to be the present value of deceased's future estate (his prospective future estate discounted to present value), and that plaintiff must affirmatively prove the value of such future estate by evidence of earnings and savings. Respondent pleaded this limitation of recovery in her complaint (R. pp. 5, 6). She further had a witness expert in the Florida law testify as to her right of action and said limitation thereon (R. p. 66; R. 1st trial, pp. 31-34, 39-42). This limitation was also charged by the District Court as being the measure of her damages (R. pp. 250, 251).

Deceased, after working at one occupation for twenty-five years (R. pp. 11, 25, 27), had savings of $2,000 (R. pp. 15, 16). His life expectancy was 25.99 years (R. p. 67), so that his future estate as shown by respondent's evidence was $2,000. This discounts at simple interest of 6% (the New York State legal rate) to a present value of $781.25. (The $2,000 in the hands of the administratrix form no part of the future estate as the administratrix already has it.) There could not properly be any finding of a present value of $20,000 which the jury awarded. Such a sum represents a future estate of $51,200 computed at the same New York State legal rate. The District Court refused to set aside this verdict (R. pp. 279-281) and entered judgment on it (R. p. 282).

The Circuit Court of Appeals in affirming the judgment held:

> "* * * the amount of the damage sustained was a question of fact not reviewable in this Court on appeal" (R. p. 290).

This, it is submitted, was erroneous.

This case does not involve a mere matter of excessiveness. The limitations imposed by Florida law and as pleaded by respondent and charged by the Trial Judge were clearly exceeded. The Circuit Court of Appeals had the power to examine and correct this and should have done so (*Reisberg* v. *Walters,* 111 F. [2d] 595, 597, 598 [C. C. A. 2]).

In a case where there is no dependency, such as in this case, the highest court of Florida has always refused to allow such a judgment to stand, because contrary to the law of Florida, although it has allowed reductions to $2,000, and in one case to $2,500, in order to terminate litigation. The Circuit Court of Appeals was bound to follow the interpretation put upon the Florida statute by the highest court in Florida (*Moore* v. *Atlantic Coast Line R.R. Co.* [C. C. A. 2], decided February 21, 1946).

Furthermore, there was a departure from the usual course of judicial proceedings by the District Court. This accident involved a collision between an auto and petitioner's truck. On which side the truck had fallen was a vital point. The District Judge stated that he took judicial notice that the truck had fallen on its left side (R. p. 91). This ruling likewise decided how the accident had occurred and whose witnesses were correct in their assertions.

There were also errors in the charge on the law as to contributory negligence and as to proximate cause which were not corrected.

It is petitioner's contention that the verdict was improper, that the Trial Judge should have set it aside and that judgment should not have been entered on it; that the Circuit Court of Appeals had power to examine the verdict and judgment as being clearly contrary to the law of Florida and should have done so in this case, especially where respondent pleads that very limitation as being her damages, the Court charged that limitation, and the limitation was clearly exceeded.

Reasons for Granting Writ

1. The Circuit Court of Appeals had the power to examine the verdict and judgment of the District Court and the amount thereof, which were contrary to the well-settled limitations of the Florida law, which limitations are pleaded by respondent as her damages and charged by the District Judge. The Trial Judge should have set it aside and judgment should not have been entered on it; and the Circuit Court of Appeals should have examined said verdict and judgment and reversed said judgment. Whether the Circuit Court of Appeals can and should reverse a judgment of a District Court which clearly exceeds in amount a definite limitation provided by law is a very important matter of frequent application.

2. The Circuit Court of Appeals has affirmed a judgment on an important question of local law (that of the State of Florida) in a way contrary to and in conflict with the applicable local decisions of the highest court of the State of Florida.

3. The Circuit Court of Appeals by its affirmance has sanctioned a departure from the usual course of judicial proceedings by the District Court.

4. The Circuit Court of Appeals erred in deciding that the error in the charge as to contributory negligence was corrected; and that there was no error as to proximate cause or that such error was corrected.

WHEREFORE petitioner respectfully prays that this petition be granted.

SWIFT & Co.,
Petitioner,
by HAROLD R. MEDINA,
Counsel.

New York, N. Y., April 5th, 1946.

Certificate

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

HAROLD R. MEDINA,
Counsel,
165 Broadway,
New York, N. Y.

New York, April 15, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No.

JENNIE HERZIG, as Administratrix of the goods, chattels and credits of Herman Weintraub, deceased,

Respondent,

against

SWIFT & Co.,

Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

There are four opinions. On first trial, District Court dismissed complaint (R. 1st trial, pp. 55-58). Reversed on appeal by Circuit Court (146 F. [2d] 444; R. 1st trial, pp. 66-71). District Court denied motion to set aside verdict (R. pp. 279-281). Affirmed on appeal by Circuit Court (R. pp. 287-290).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 15, 1946. Jurisdiction to entertain this petition is provided by U. S. Code Title 28, Section 347.

Statement of the Case

Respondent, as administratrix of the estate of Herman Weintraub, brought this action to recover damages under Florida law for his death on January 23, 1941, in an automobile accident in Florida alleged to have been caused through the negligence of petitioner.

Deceased had no dependents (R. pp. 5, 8, 9) and the action was brought by his administratrix. Respondent pleaded the Florida statutes (R. p. 5). They provide as follows:

> Section 4960 (now 7047): "Whenever the death of any person of this State shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default, of any agent of any corporation in his capacity of agent of such corporation * * * and the act, negligence, carelessness or default is as would, if the death had not ensued, have entitled the party injured to maintain an action * * * and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation * * *, which would have been liable in damages, if death had not ensued, shall be liable to an action in damages * * * notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."
>
> Section 4961 (now 7048): "Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there was neither widow or husband surviving the deceased, then the minor child or children may maintain an action; and where there was neither widow nor husband nor minor child nor children then the action may be maintained by any person or persons dependent upon such person killed for a support, and where there is neither of the above classes of the persons to sue then the action may be maintained by the executor or administrator as the case may be, of the person killed."

Respondent also pleaded that pursuant thereto the administratrix may recover the value at decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. pp. 5, 6).

It was stipulated that the testimony of respondent's witness Walter O'Rourke would be the same as on the record of the first trial and deemed in evidence (R. p. 66). He testified that in this class of cases the rule of damages was the value at the time of decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. 1st trial, pp. 31, 34); that where a man had high earnings but no savings there would be no prospective estate (R. 1st trial, pp. 41, 42); that the burden of proving such expectation of savings and prospective earnings is affirmatively on plaintiff (respondent here) (R. 1st trial, p. 34); and that where there is no reasonable future expectation of an estate the recovery may be nominal (R. 1st trial, pp. 33, 39, 40). Deceased at time of his death was forty-three years old (R. p. 11) and had been working for about twenty-five years as a partner in a rigging company (R. pp. 11, 25, 27). His earnings for 1940, which respondent contended was an average year, were $2,852.64 (R. pp. 50-52, 55). His savings were about $2,000 (R. pp. 15, 16). He had a life expectancy of 25.99 years (R. p. 67). He had no car of his own and was using a borrowed car (R. p. 22).

There was a verdict by the jury after trial in the District Court for $20,000, which the District Court refused to set aside (R. pp. 279-281) and entered judgment for $20,171.50 (R. p. 282). Petitioner appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed said judgment and entered its judgment March 15, 1946 (R. p. 291).

The Circuit Court of Appeals held that the amount of the damages was a question of fact which it had no power to review.

Petitioner now prays for the issuance of a writ of certiorari directed to said Circuit Court of Appeals to review the case and examine the judgment which is contrary to the Florida law.

Assignments of Error

The Circuit Court of Appeals erred in the following respects:

1. In not examining as to amount the judgment of the United States District Court on the ground that it had no power to do so.

2. In affirming without reviewing a District Court judgment on an important question of local law (that of the State of Florida) in a way contrary to and in conflict with the applicable local decisions of the highest court of the State of Florida in a manner which the highest court of the State of Florida has strongly and repeatedly refused to permit.

3. In sanctioning by its decision a departure from the usual course of judicial proceedings by the District Court.

4. In deciding that the error in the charge as to contributory negligence was corrected.

5. In deciding that there was no error in the charge as to proximate cause or that such error was corrected.

POINT I

The Circuit Court of Appeals should have reviewed the amount of the District Court judgment which clearly exceeds the limitation provided by the Florida law. The right and power of the Circuit Court of Appeals to make such review where a limitation provided by law has been exceeded is of great importance and frequently exercised. The omission to do so here should be reviewed by this Court.

The general rule is that the Circuit Court of Appeals may not examine the amount of the verdict either as to inadequacy or excessiveness. It may, however, examine such amount where it is either below or above what the plaintiff clearly may recover as a matter of law. There are numerous cases where the circuit courts have done this. The Circuit Court of Appeals has also often considered in what event they had the right to review the amount.

In *Reisberg* v. *Walters,* 111 F. (2d) 595, 597, 598, the Circuit Court of Appeals for the Second Circuit reviewed all the law on the subject and concluded that it had the right to review the judgment as to amount where the jury gave less than the undisputed amount or in excess of a definite limitation provided by law.

In *Herring* v. *Luckenbach SS. Co., Inc.,* 137 F. (2d) 598 (C. C. A. 2), the Court said:

> "* * * appellate courts act in general only where an improper excess is clearly ascertainable from the record."

The right to consider such amount was also similarly reviewed in *Paine* v. *St. Paul Union Stockyards Co.,* 35 F. (2d) 624, and in *Wayne* v. *N. Y. Life Insurance Co.,* 132 F. (2d) 28, 37. The decision of this Court in *Fairmont*

Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474, 484, 485, supports this and contains nothing to the contrary.

Furthermore, it was error for the District Court to enter judgment upon this verdict and it was within the power and duty of the Circuit Court of Appeals to review this error. As was said in *Glenwood Irr. Co.* v. *Vallery*, 284 Fed. 483, at p. 484:

> "The verdict is perverse and directly violative of the charge of the Court. When that appears as a matter of mathematical calculation, the verdict cannot stand. It is error of law to enter judgment upon it, which an Appellate Court may properly review * * *. Nor does such a decision violate the rule that a refusal of the trial Court to disturb the verdict on motion for a new trial is matter of discretion, because the duty not to enter judgment upon such a verdict is one of law, and not of discretion. Or, if there was discretion, it was so abused as to support correction on writ of error."

To same effect are *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399, 410 (C. C. A. 6); *Paine* v. *St. Paul Union Stockyards Co.*, 35 F. (2d) 624, 627.

The Circuit Court of Appeals clearly had the power to review the judgment of the District Court which was not based upon a future estate as evidenced by earnings and savings and was contrary to the law of Florida. It should have reversed said judgment. In this case there was a distinct, definite limitation on the recovery. Respondent pleaded that limitation: that the administrator may recover the value at decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. pp. 5, 6). The District Court so charged (R. pp. 250, 251), saying: "Your function is to judge how much would that man have accumulated and saved or put by in the years during which he would have lived had he not been killed, and you must discount that at the present value" (R. p. 251).

The matter of whether the Circuit Court of Appeals can and should reverse a judgment of a District Court where the amount awarded clearly exceeds a limitation provided by law is of great importance and of frequent application in the Federal courts. There is not a re-examination of the facts passed on by the jury, because in this case the jury has no right to exceed or disregard such limitation as a matter of law.

POINT II

The verdict and judgments of the District Court and the Circuit Court of Appeals are contrary to the law of Florida.

The Florida law provides for a right of action by a husband or widow or minor children or by dependents, or, if there is none of these classes, then by an administrator (R. p. 5). The Florida courts do not impose any limitation on a recovery in the first three classes. For example, in *Foster* v. *Thornton,* 125 Fla. 699 (170 So. 459, also reported 152 So. 677 and 160 So. 580), a judgment for $15,000 for loss of plaintiff's wife was upheld. It is only where there is no dependency and the action is brought by the administrator that there is this limitation.

Respondent pleaded the limitation of recovery under the Florida law and the District Court charged it. The Florida cases are:

Jacksonville v. *Bowden,* 54 Fla. 461 (45 So. 755);
Florida East Coast RR. Co. v. *Hayes,* 67 Fla. 101 (64 So. 504);
Marianna v. *Blountstown,* 83 Fla. 542 (91 So. 553);
Union Bus Co. v. *Smith,* 104 Fla. 569 (140 So. 631);
Atlantic Coast v. *Woods,* 110 Fla. 147 (148 S. 542);
International Shoe v. *Hewitt,* 123 Fla. 587 (167 So. 7).

Both the District Court and the Circuit Court of Appeals appear to stress the earning capacity of deceased and overlook the necessity of respondent proving what deceased would save out of such earnings. Although he earned $2,852.64 for 1940, which respondent contended was an average year (R. pp. 50-52, 55), he was not a saving man, and there was no incentive or inducement for him to save. At the time of the accident he was on a winter vacation, using a borrowed car. If there are no savings there would be no future estate no matter how much the earnings (R. 1st trial, pp. 41, 42). As the Court said in *International Shoe* v. *Hewitt*, 123 Fla. 587 (supra):

> "It is a matter of common knowledge that the average person saves very little above living expenses and leaves very little of anything in the way of an estate."

In this case the future estate could be readily computed. In twenty-five years at the same work he had saved $2,000. (This is not included in the future estate as the administratrix already has it.) He had a life expectancy of 25.99 years, so that under the evidence his future estate would likely be $2,000. This discounts at simple interest of 6% (the New York State legal rate) to a present value of $781.25. It clearly appears that the jury in awarding $20,000 disregarded the limitations contained in the Florida law and in the charge of the District Judge. This sum represents a future estate of $51,200 computed at the same New York State legal rate.

In *Florida East Coast RR. Co.* v. *Hayes*, 67 Fla. 101 (64 So. 504) (supra), where there was a life expectancy of forty years, the Court computed that where such future estate was $1,000, its present value was $46.02; and that a present judgment of $15,000 represents an estimated future estate of over $300,000. At page 105 the Court said:

> "* * * the proper measure of such damages is the present worth of decedent's life to an estimated prospective estate that he probably would have earned and saved after becoming of age and during his life expectancy to be left at his death."

The highest court in Florida has never allowed such a judgment to stand, because contrary to the law of that State, although it has allowed remittiturs to be filed for reduced amounts in order to terminate litigation. But in no such case has it allowed such amount in over $2,000 except in one case, where it allowed $2,500.

The present judgment is in conflict with the decisions of the highest court of Florida. Furthermore, that law is the law of this case, as pleaded, evidenced, tried and charged.

If this judgment is allowed to stand it will always be a source of embarrassment to the highest court of Florida.

POINT III

There was a departure from the usual course of judicial proceedings by the District Court.

During the trial the District Court stated as a matter of law how the accident had, in part, occurred. This was not a ruling on something during the trial, nor a casual statement. It was a ruling of law. The matter was important and on a vital point in the case.

This case involved a collision in daylight on a long, straight road between Weintraub's northbound Buick and petitioner's southbound truck. The petitioner's testimony was that the truck was on its own side of the road following the car of a Mrs. Youngs when it was struck by the Buick which was operated fast and out of control. Mrs. Youngs, who was respondent's only witness to the occurrence, stated that the truck was passing her car and was partly on the left side of the road at the time of the contact. At the time of the contact and immediately afterwards she had been subjected to a number of severe shocks.

The question was whether she saw the truck alongside her car or heard the collision to her rear and looked back.

She distinctly remembered seeing the truck fall on its side away from her and saw its wheels. If the truck was alongside of her, then this was the left side. If the truck fell on its right side as petitioner's witnesses stated and the photographs showed, then she had heard the noise behind her and had looked back and seen it. It was error, therefore, for the District Judge to rule:

> "The Court: I will take judicial notice that the side away from her was the left side, and that is the side on which the truck fell" (R. p. 91).

This ruling by its nature decided also as to how the accident occurred and was a contradiction of petitioner's evidence. As it was a ruling of law, the jury was bound to obey it. The Circuit Court of Appeals was in error in not reversing the judgment of the District Court upon this ground.

POINT IV

The Circuit Court of Appeals erred in its decision as to the charge of the District Court.

There were two distinct errors of law in the charge. The main charge as to contributory negligence was not complete in that the Court had not charged that there could be no recovery if deceased was negligent in the slightest degree and such negligence contributed to the accident. This law applies in Florida, New York, and the Federal courts (*Co-operatives* v. *Shields,* 71 Fla. 110 [70 So. 924]; *Rydell* v. *Greenhut,* 140 App. Div. [N. Y.] 926; *New York* v. *Thierer,* 221 Fed. 571, 574). Petitioner requested the Court to charge accordingly (R. p. 255). The Court thereafter gave a further charge which again omitted this (R. p. 258). The Circuit Court of Appeals is in error in holding that this error was cured (R. p. 290).

It was error for the District Judge to charge that proximate cause was not so important in this case (R. p. 252), to which petitioner excepted (R. pp. 253, 254). In view of the undenied extreme and unchecked speed of Weintraub's car, proximate cause was definitely important. This was not corrected in the further charge (R. pp. 257, 258). It was error for the Circuit Court of Appeals to hold in effect that there was no error in this or that it had been cured (R. p. 290).

Wherefore, petitioner prays that a writ of certiorari issue of this Honorable Court to the United States Circuit Court of Appeals for the Second Circuit to review said cause.

Respectfully submitted,

HAROLD R. MEDINA,
Counsel for Petitioner.

GEORGE J. STACY,
JOSEPH KANE,
of Counsel.

MAY 8 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1945

No. 1136

SWIFT & CO.,

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against

JENNIE HERZIG, as Administratrix of the goods, chattels and credits of HERMAN WEINTRAUB, deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SAMUEL J. SUSSMAN,
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MORRIS A. KAPLAN,
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INDEX

PAGE

Statement 1

Salient Testimony 2

Jurisdiction 5

POINT I—There is no limitation provided by Florida law as to the amount of a judgment, as such, in a case of this nature. Neither the Circuit Court of Appeals nor this Court, therefore, will review the amount of the judgment awarded by the District Court 9

POINT II—The verdicts and judgments of the District Court and the Circuit Court of Appeals are not contrary to the law of Florida 14

POINT III—The trial of this action was properly conducted by the District Judge and there was no departure from the usual course of judicial proceedings 18

POINT IV—The Circuit Court of Appeals did not err in its decision as to the charge of the District Court 20

CONCLUSION 21

CASES CITED

PAGE

American Construction Co. v. Jacksonville etc. R. Co., 148 U. S. 372 5

Atlantic Coast Line R. Co. v. Woods, 110 Fla. 147 ..... 7, 17

Cudahy Packing Co. v. Ellis, 105 Fla. 186 7

Fairmont Glass Works v. Cab Fork Coal Co., 287 U. S. 474, 481 ..... 7, 13

Florida East Coast Ry. Co. v. Hayes, 67 Fla. 101 ..... 7, 14, 16

Foster v. Thornton, 125 Fla. 699 ..... 12, 17

Hamilton-Brown Shoe Co. v. Wolf, 240 U. S. 251 6

Herzig v. Swift & Co., 146 F. (2d) 444 7

International Shoe Co. v. Hewitt, 123 Fla. 587 ..... 7, 15, 17

Jacksonville Elec. Co. v. Bowden, 54 Fla. 461 ..... 7, 8, 10, 12, 16

Marianna & Blounstown v. May, 83 Fla. 524 16

Pariser v. City of New York, 146 F. (2d) 431 13

Shayne v. Saunders, 176 So. 495 20

Union Bus Co. v. Smith, 104 Fla. 569 16

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This action was commenced by the respondent to recover damages for the wrongful death of the deceased. The decedent, a resident of the State of New York, met his death in Florida while operating a motor vehicle which collided with a motor vehicle owned by the petitioner and operated by its agent. The cause was originally commenced in the Supreme Court of the State of New York, County of Kings, but at the instance of the petitioner was removed to the United States District Court for the Eastern District of New York by reason of diversity of citizenship.

The action was tried twice in the United States District Court for the Eastern District of New York. The first trial resulted in a dismissal of the complaint at the con-

clusion of the respondent's case because of a purported lack of proof of damage. Upon appeal to the United States Circuit Court of Appeals for the Second Circuit the latter Court reversed the judgment of the District Court and ordered a new trial, rendering an opinion which considered at length the Florida rule of damage (146 F. 2d 444). Thereafter, at a second trial, a jury awarded the respondent a verdict of Twenty thousand ($20,000) Dollars (R. p. 259). The Trial Court, by written opinion, denied the petitioner's motion to set aside the verdict (R. pp. 279-281). The Circuit Court of Appeals affirmed the judgment entered on the verdict (R. pp. 287-290). The petitioner now applies for a writ of certiorari in order to bring up for review the judgment of the District Court which has been affirmed by the Circuit Court of Appeals.

Salient Testimony

The jury having rendered its verdict in favor of the respondent, it must be presumed that the testimony of the witnesses offered on behalf of the respondent was credited by it. The following summary of the salient testimony of the respondent's witnesses is therefore offered for the convenience of the Court.

Mrs. Youngs

The only eyewitness to the occurrence who was not connected in any way with either party was a Mrs. Youngs. The latter, a lifetime resident of Fulton, New York (R. f. 205), was driving south in Florida on January 23, 1941 (R. f. 207). Her little boy, five years of age, accompanied her (R. f. 216). The highway on which she was driving was a two-lane highway, one lane for northbound and the other for southbound traffic; the lanes separated by a painted yellow line (R. f. 215). The over-all width of the roadway was 20 feet (R. f. 240), i.e., 10 feet for each lane.

She was driving about 2½ to 3 feet from the edge of the roadway to her right (R. f. 211). The petitioner's truck, in the act of passing to her left, reached a point level with her car windows when it came into collision with the car driven by the deceased approaching from the opposite direction (R. ff. 207, 208). The collision took place on the opposite side of the road (R. ff. 212, 213). Both the truck and the deceased's car tipped over (R. ff. 208, 214). After tipping, the truck and car came to rest on the opposite side of the road (R. f. 213). When the impact occurred the truck was so near her that she screamed as it tipped, thinking it was going to take her with it (R. f. 269). At the time of the impact the deceased's car was not on her side of the roadway, but on the northbound strip, "toward the outside more than the inside" (R. ff. 250, 251).

Mrs. Youngs made an affidavit concerning her knowledge of the accident for the petitioner's representatives in Florida (R. f. 219). She was not requested to appear at the trial by the petitioner (R. f. 220).

Jennie Herzig

The respondent offered three witnesses to make out proof of damage; Mrs. Herzig, sister of the deceased; Arthur Abeloff, partner of the deceased, and Bernard Lesch, certified public accountant of the partnership, of which deceased was a member at the time of his death. Mrs. Herzig testified that the deceased was a childless widower, forty-three years of age (R. f. 31). He was about 6 feet tall weighed 190 to 195 pounds, and enjoyed perfect health (R. f. 33). He left $1,850 in a savings bank and $162 in a loan organization (R. f. 46). There was also due him $2,000 from members of his family, representing moneys loaned to a husband of a sister of the deceased, when the latter went into business, and moneys loaned to Mrs. Herzig when she purchased a house in 1940 (R. ff. 48-51). This indebtedness was still outstanding at the time of trial (R. f. 50).

ARTHUR ABELOFF

The deceased and Abeloff were members of the partnership known as the Belmont Hoisting and Rigging Company, which consisted of four partners who had been in the rigging and hoisting business together since 1919 (R. ff. 71-73). Prior to the inception of the partnership in 1916 one of the partners had worked for the deceased as an employee (R. ff. 80, 81).

In late 1940 and early 1941 the deceased worked at Camp Dix (R. ff. 81, 82). He had about twenty men under his supervision and direction at Camp Dix, who installed the boilers, kitchen equipment, bathroom equipment and similar heavy equipment at the barracks (R. f. 83). This material had to be carried by the men, including the deceased, because there was no house on which to fasten any rigging (R. ff. 84, 85). The Camp Dix job took about four months, during which time the deceased was the sole partner in attendance (R. ff. 86, 87).

Prior to the Camp Dix job the deceased had also worked on the Fort Greene housing project and other buildings in Brooklyn (R. ff. 89, 90). He held a hoisting engineer's license issued by the City of New York (R. ff. 90, 91). He worked steadily on the job every day and was the only member of the partnership in full charge of the outside work (R. ff. 96, 97). The partnership maintained a regular set of books. The partners had an oral partnership agreement and were all listed as equal partners in the business (R. f. 109).

Most of the partnership's work consisted of bringing heavy equipment into new buildings under the course of construction (R. f. 116). In 1940 and 1941 new building construction by private parties fell away to practically nothing (R. f. 116) and the partnership's work was performed on city and government projects (R. ff. 117, 118).

BERNARD LESCH

Bernard Lesch is the certified public accountant who audited the books of the Belmont Hoisting and Rigging Company from 1936 to the date of the trial (R. ff. 142, 143). He compiled a profit and loss statement for the year 1940 from the books of the partnership (R. ff. 145, 146).

The partners were entitled to an equal distribution of profits and shared losses equally (R. f. 147). The partnership made a profit of $11,410.57 for the year 1940 (R. f. 150). The deceased's share was $2,852.64, which did not include $1,040, or $20 per week, for expenses (R. ff. 151-153). The partnership owned four trucks, a Buick car, hoisting engines, planks, ropes and similar equipment (R. f. 154). For the year 1940 the partners drew $14,196 jointly, exclusive of expense money (R. f. 156), or a gross of $18,736.37 (R. f. 157). The year 1940, for which the above figures were given, was an average year (R. f. 166).

It was stipulated that the deceased had a life expectancy of 25.99 years (R. f. 200).

Jurisdiction

The petitioner's brief asserts that jurisdiction to entertain the petition is provided by U. S. Code, Title 28, Section 347. It has been held that the matter of granting a writ of certiorari under the foregoing section rests in the discretion of this Court.

> *American Construction Co.* v. *Jacksonville etc. R. Co.*, 148 U. S. 372.

On numerous occasions this Court has stated that its discretion to entertain jurisdiction of applications of this nature must be exercised sparingly.

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in

> order to secure uniformity of decision. Lau Ow Bew, Petitioner, 141 U. S. 583, 587; In re Woods, 143 U. S. 202; Lau Ow Bew v. U. S., 144 U. S. 47; *American Construction Co.* v. *Jacksonville etc. R. Co.*, 148 U. S. 372, 383; Forsyth v. Hammond, 166 U. S. 506, 514; Fields v. U. S., 205 U. S. 292, 296."
>
> *Hamilton-Brown Shoe Co.* v. *Wolf*, 240 U. S. 251.

It is respondent's contention that an examination of the record clearly indicates that this cause is a simple negligence case involving disputed issues of fact on negligence, contributory negligence and damages; all of which were resolved by a jury in favor of the respondent. No issue involved in this case is of "peculiar gravity or general importance"; nor is there any cleavage of authority on any of the principles involved in this case which require decision by this Court "to secure uniformity of decision". In order to persuade this Court to grant a writ of certiorari, petitioner urges:

1. That the verdict and judgment of the District Court and the amount thereof "were contrary to the well-settled limitations of the Florida Law, which limitations are pleaded by respondent as her damages, and charged by the District Judge" (Petition, p. 4).

However, as was pointed out by the Circuit Court on the first appeal, there are no well-settled limitations on the amount of a recovery in a case of this nature under the Florida law.

> "The Florida cases have not laid down any strict group of criteria against which to measure the damages to the estate. The statute has been interpreted to permit recovery equal to the difference between the estate as it existed at the time of the decedent's death and what the estate would have consisted of had the decedent not been killed at that time. Proof of earnings is a factor to be taken into consideration in a determination of the value of the estate the decedent would have accumulated. But it is not an

> indispensable factor. The evidence as to the health, habits, and industry of the decedent was sufficient to permit the jury to make a determination."
>
> *Herzig* v. *Swift & Co.*, 146 F. (2d) 444.

In determining the foregoing the Circuit Court cited, in a footnote to its opinion, the following cases decided by the Court of last resort of Florida: *Jacksonville Elec. Co.* v. *Bowden*, 54 Fla. 461; *Florida East Coast Ry. Co.* v. *Hayes*, 67 Fla. 101; *Cudahy Packing Co.* v. *Ellis*, 105 Fla. 186; *Atlantic Coast Line R. Co.* v. *Woods*, 110 Fla. 147; *International Shoe Co.* v. *Hewitt*, 123 Fla. 587.

In effect, as is indicated in Point I below, it becomes obvious that petitioner is urging this Court to review the *amount* of a verdict which has been awarded by a jury and approved by the District Court. This Court has repeatedly held that it will not review a denial by a federal trial court of a motion to set aside a verdict as excessive, and that the rule likewise precludes review of such action by the Circuit Court of Appeals.

> *Fairmont Glass Works* v. *Cab Fork Coal Co.*, 287 U. S. 474, 481.

2. As a further reason for granting the writ petitioner urges that the Circuit Court has "affirmed a judgment on an important question of local law (that of the State of Florida), in a way contrary to and in conflict with the applicable local decisions of the highest Court of the State of Florida" (Petition, p. 4). In view of the fact that petitioner concedes that the law of Florida was properly charged by the Trial Court, it is difficult to understand how it can be urged that the Circuit Court's affirmance is contrary to and in conflict with the applicable local decisions of Florida. In its opinion (R. p. 289) the Circuit Court cites two leading Florida cases on the subject of damages: *Florida East Coast Ry.* v. *Hayes*, 67 Fla. 101, and *Jacksonville Electric Co.* v. *Bowden*, 54 Fla. 461. The

Circuit Court quoted from the *Jacksonville Electric* case the elements required to be taken into consideration in assessing damages, and then pointed out that there was evidence in the record of these elements. The Circuit Court stated:

> "This decedent was forty-three years old, and he had a life expectancy of 25.99 years. He was a strong, industrious man regularly engaged in the business of the partnership in which he had an interest and had saved about $2000. in a comparatively short time. There was, therefore, evidence, as to the damages and, though the verdict may have been generous, the amount of the damage sustained was a question of fact not reviewable in this court on appeal. Fairmount Glass Works v. Cab Fork Coal Co., 287 U. S. 474, 484-85; Pariser v. City of New York, Cir. 2, 146 F. (2d) 431, 433-34" (R. p. 289).

This Court's attention is directed to the fact that the petitioner cites in its brief in support of the petition the very same Florida cases cited and followed by the Circuit Court in its opinion as determinative of the Florida law of damages. How then can it now be urged that the Circuit Court has affirmed the judgment in a manner contrary to and in conflict with the applicable decisions of the highest Court of Florida?

3. As a third reason for granting the writ, it is urged that the Circuit Court, by its affirmance, has sanctioned a departure from the usual course of judicial proceedings by the District Court. This point is amply answered on the merits in Point III below. However, in any event it does not present good and sufficient reason for exercising the discretion of this Court to grant a writ, since, obviously, it does not involve any question of peculiar gravity or general importance, nor of uniformity of decision.

4. As a last reason for granting the writ, the petition urges that the Circuit Court committed error in deciding

that the alleged error in the charge concerning contributory negligence was corrected; and in holding that there was no error as to proximate cause or that such error was corrected. This is answered at length in Point IV below. Certainly no question of general importance or peculiar gravity nor of uniformity of decision is involved here. It follows that this ground does not support the issuance of a writ.

In summary, upon reconsideration of the grounds urged by the petitioner upon this Court to take jurisdiction of this cause and grant the issuance of a writ of certiorari, there appears to be completely lacking any question of import or of uniformity of decision which would require the exercise of this Court's discretion to entertain jurisdiction. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

POINT I

There is no limitation provided by Florida law as to the amount of a judgment, as such, in a case of this nature. Neither the Circuit Court of Appeals nor this Court, therefore, will review the amount of the judgment awarded by the District Court.

At the very outset of Point I of the petitioner's brief in support of its application for a writ of certiorari the petitioner concedes: "The general rule is that the Circuit Court of Appeals may not examine the amount of the verdict either as to inadequacy or excessiveness" (Br. p. 11). In order to circumvent the application of this rule petitioner urges: "in this case there was a distinct, definite limitation on the recovery" (Br. p. 12).

It is stated that the Circuit Court of Appeals has a right to review a judgment as to amount, where the jury gives less than an undisputed amount, or in excess of a

definite limitation provided by law. With this statement of principle the respondent has no quarrel. Petitioner's difficulty lies in the fact that, contrary to its assertion, the Florida law provides no definite limitation of damage as to amount. On the contrary the highest courts of Florida have ruled that of necessity it is impossible to place a definite limitation on damage in a case of this nature.

As the pleadings indicate, this action is commenced under the statutory law of Florida to recover damages for the wrongful death of deceased. Since the deceased in this case left no one surviving dependent upon him for support, under the law of Florida the damage recoverable is the value of the life of the deceased to his estate, i.e., the estate the deceased would have accumulated had he lived out his normal life span, discounted to its present value. Obviously it is not possible to set up a rigid formula by which it is possible to compute the value of the estate of the deceased under such circumstances. The highest Court of Florida has so ruled, and has indicated in so doing the intangible external indicia to be taken into consideration by a jury in fixing the value of such an estate. Thus in *Jacksonville Electric Co.* v. *Bowden*, 54 Fla. 461, a case relied upon by petitioner, the highest Court of Florida stated:

> "In the nature of things an exact and uniform rule for measuring the value of the life of a deceased person to designated beneficiaries or to his estate is not practicable if possible. The elements which enter into the value of a life to the estate of a deceased person are so various and contingent that they must be left under proper instructions from the court to the determination of the jury, based on proper testimony applicable to the particular case. The jury have no arbitrary discretion but among other proper elements they may consider evidence as to the age, probable duration of life, habits of industry, means, business, earnings, health and skill of the deceased, and his reasonable future expectations."

There is proof in the record concerning each of the elements enumerated above by the Florida Supreme Court, viz., age (R. f. 31); probable duration of life (R. f. 200); habits of industry (R. f. 95); means, business and earnings (R. ff. 46-50, 154); health (R. f. 38, 95); skill (R. f. 97); and his reasonable future expectations (R. f. 189). Moreover, all of this proof was uncontradicted; petitioner offered no proof whatsoever on damages.

It will be noted that the Trial Court's charge followed closely the law of Florida as enunciated by its highest Court, and as found in the Circuit Court of Appeals in the opinion written upon the appeal on the judgment rendered after the first trial of this case, as follows:

> "If you find for the plaintiff and you come to the question of assessing damages, you will award the pecuniary value at the decedent's death of the prospective earnings and savings which the evidence indicates could reasonably have been expected but for the death of the deceased. In determining this pecuniary value the jury may take into consideration evidence as to the age, probable duration of life, habits of industry, means, business, earnings, health and skill of the deceased and his reasonable future expectations, and, stated in another way, the rule is that the one bringing the action, the plaintiff here, would be entitled to recover that which the decedent would accumulate during his natural life, taking into account his age, his habits, his health, his mental and physical capacity and ability, his probable life expectancy and his net earnings at the time of his death. I am going to help you with one more of these instructions in the attempt, if I can, to simplify it a little. The measure of damages in this case is the difference between Weintraub's estate as it existed when he died and what his estate would have consisted of had he not been killed. Proof of earnings is a factor to be taken into consideration, but it is not an indispensable factor. The jury may make a determination based upon the health, the habits and the industry of the decedent. There is no such thing in this case as a recovery for pain and suffering.

> There is no such thing in this case as recovery for what Weintraub might have given in the way of support to anybody. That is out. It is purely a question of what was his estate when he died and what would his estate have been had he lived—how much would he have saved—how much would he have accumulated —and on that issue you have the uncontrovertible fact that his expectancy of life was 25.99 years. That does not mean you would have to find that he would have lived that long, but it is a guide that the normal male being of that age may live 25.99 years" (R. pp. 250-251).

It is clear that the jury was properly charged as to the rule of damage to be applied; even petitioner does not question the propriety of the charge. As indicated above there is evidence in the record of every element making up the Florida measure of damage in a case of this nature. The excerpt quoted above from the *Jacksonville Electric* case, the opinion of the highest Court of Florida, directly contradicts petitioner's assertion that a definite limitation, as such, is placed upon the amount of recovery by the law of Florida. In fact, in a recent decision, the highest Court of Florida has gone so far as to state that in fixing damages for wrongful death there is no criterion other than the conscience of the jury, and that if the amount is not shocking or unreasonable it will not be set aside.

> "It is contended that the verdict is excessive. The answer to this is that outside of the amount allowed for doctors, nurses and medical bills, there is no criterion for fixing an allowance in such cases, but the conscience of the jury. No two juries would likely allow the same amount, but so long as the amount assessed is not shocking or unreasonable in the mind of this court, it will not be disturbed. The amount of the damages, like the question of negligence, was essentially a jury question, the verdict reached finds support in the record, and the damages awarded are not unreasonable."
>
> *Foster* v. *Thornton,* 125 Fla. 699.

The Trial Court in this case made a specific finding in his opinion that the size of the verdict was neither shocking or excessive (R. p. 281).

It becomes clear that petitioner's attack upon the jury's verdict is in reality based upon excessiveness. It is important to note that petitioner does not anywhere urge that there is *no* evidence of damage. Under these circumstances it is well settled that this Court has no authority to disturb the jury's verdict as excessive even if such were the fact. In *Fairmount Glass Works* v. *Cab Fork Coal Co.*, 287 U. S. 474, 481, this Court so held:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, has been settled by a long and unbroken line of decisions, and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise review of such action by a Circuit Court of Appeals."

The Circuit Court of Appeals for the Second Circuit recently stated on the same question:

> "Finally, the defendant contends that we ought to review the perhaps too generous award made to the plaintiff by the jury on the ground that it was excessive. But the instructions of the trial court as to the rule to be applied by the jury in fixing damages were entirely correct and were not objected to. If the amount of the verdict be regarded as in fact excessive, nevertheless it was the jury's estimate arrived at after a proper charge. Such a matter is not reviewable on appeal but is solely one of fact for the jury to determine. Southern Ry. Carolina Division v. Bennett, 233 U. S. 80, 87; Herencia v. Guzman, 219 U. S. 44, 45; Swift & Co. v. Ellinor, 131, 132; Metropolitan St. Ry. Co. v. Jacobi, 112 Fed. 924, 925."

Pariser v. *City of New York*, 146 F. (2d) 431.

Since there is no monetary limitation provided by Florida law and the Trial Court properly and fully charged the jury as to all the elements of damage required to be taken into consideration in rendering a verdict, the jury's verdict, approved by the Trial Court, may not be here attacked.

POINT II

The verdicts and judgments of the District Court and the Circuit Court of Appeals are not contrary to the law of Florida.

The petitioner urges under its Point II that the verdict was improper because of alleged failure to discount the value of the future estate as found, to its present value, pursuant to *Florida East Coast Ry. Co.* v. *Hayes,* 67 Fla. 101. The Trial Court carefully charged the jury that it was required to discount the future estate to its present value and illustrated what it meant:

> "Your function is to judge how much would that man have accumulated and saved or put by in the years during which he would have lived had he not been killed, and you must discount that at the present value. What do I mean by that? Obviously the present value of what his estate would be 26 years from now is less than that figure. That is clear, is it not? Because if you get it now you can put it away and get interest on it. Do I make myself clear? You will take that into consideration that it must be discounted to the value of 1941" (R. f. 752).

The petitioner seeks to apply a strict mathematical formula of discount, urging "that where such future estate was $1,000, its present value was $46.02" on a life expectancy of forty years according to *Florida East Coast Ry. Co.* v. *Hayes,* 67 Fla. 101. However, if this formula were strictly followed how could the Supreme Court of

Florida in the subsequent case of *International Shoe Co.* v. *Hewitt,* 123 Fla. 587, have allowed *any* recovery where the evidence showed *no* savings and *no* earnings for a long period prior to death?

The petitioner further urges that since the deceased had savings of $2,000, and a life expectancy of 25.99 years, his future estate would likely be $2,000, which discounts at simple interest at 6% (the New York State legal rate) to a present value of $781.25. From the foregoing it is reasoned that the jury disregarded the Florida law in awarding a verdict of $20,000 because the latter represents a future estate of $51,200 computed "at the same New York State legal rate".

The petitioner's argument is fallacious both on the facts and conclusions drawn. In the first place the evidence indicates savings of $2,000, plus debts due the estate exceeding $2,000. In the second place it is common knowledge that a 6% rate of discount is improper since the Court will take judicial notice that savings banks in New York State do not pay 6% interest but on the contrary pay a maximum of 2% interest, and in most cases 1½%.

With respect to the petitioner's argument on discount, perhaps the best answer thereto is made by the Trial Court in its opinion as follows:

> "The present day value of a sum of money to be realized at some future date is in reality a question of fact. The trier of the fact must determine what rate of discount he will apply, and this varies widely with economic conditions. Even actuaries do not agree exactly; the rate may differ in communities which geographically are not far apart. And the rate to be applied is merely one of the elements which enter into the factual determination" (R. f. 842).

Moreover the jury was entitled to consider that the deceased was entering the most productive period of his life at a time when this country was about to enter the late war, which caused an increase up to the present date

in the income of virtually every person possessed of skill and ability similar to those of deceased. The petitioner also completely fails to take into account the value of the deceased's interest in the partnership, which owned four trucks, a Buick car, hoisting engines, planks, ropes and similar equipment, according to the testimony of the accountant (R. f. 154).

The cases cited by the petitioner under this point are entirely dissimilar in their facts from the matter at law. In *Jacksonville Electric Co.* v. *Bowden,* 54 Fla. 461, the deceased was an infant. The exact age and earning capacity does not appear in the opinion. A verdict of $1,000 rendered in 1906 was affirmed. Of course the intrinsic value of the dollar has decreased considerably since 1906. Moreover, there is a vast difference between an infant of uncertain, if any, earning capacity, in the impoverished deep South of 1906, and a man of excellent health and physique, with considerable skill and attainment, holding an established position as a part owner of a business in New York City in 1941.

A similar difference exists between the facts of this case and *Florida etc.* v. *Hayes,* 67 Fla. 101, cited by the appellant. There a verdict of $15,000 was reduced to $2,000 in 1914. The deceased was but thirteen years of age and earned but $5 per week at the time of his death.

In *Marianna & Blounstown* v. *May,* 83 Fla. 524, cited by the petitioner, the deceased was not in normal physical condition, but was "fitified"; had been in an asylum; had fits every two or three weeks and for two days thereafter could not work; his father, for whom he worked, gave him money and clothes as needed.

Union Bus Co. v. *Smith,* 104 Fla. 569, also cited by the petitioner, is so far afield on the facts it is difficult to understand its citation. The deceased was twenty-one years five months of age at the time of her death. At times she had earned $1.50 to $2 per day. Her father testified "she had probably earned, up to this period in her life, as much as $50"! A verdict of $4,000 was set aside as excessive.

In *Atlantic Coast* v. *Woods,* 110 Fla. 147, similarly cited by the petitioner, the deceased had been convicted of forgery, served two years in prison, had accumulated no estate, and was not engaged in lawful employment or even earning a livelihood. The Trial Court directed a verdict for the defendant but subsequently granted a new trial. The defendant appealed, urging no evidence of damage, but the highest Court of Florida affirmed despite the foregoing evidence, holding the jury could nevertheless find that deceased "would probably have lived some period of time and have accumulated and left at his death property of at least small value, had he not died as a result of defendant's negligence as alleged".

In the latest case cited by the petitioner, *International Shoe Co.* v. *Hewitt,* 123 Fla. 587, the sole litigated issue was damages. The deceased was a young woman twenty-two years of age. She had once earned $100 per month as a stenographer, but for four years immediately prior and up to her death "she had earned no money but had lived with her parents and assisted with the housework". No evidence of accumulation of estate appeared. The highest Court of Florida nevertheless allowed a recovery, although reducing it from $4,500 as excessive, to $2,500.

From petitioner's citation of the foregoing cases which are concerned with excessive verdicts, it appears that in reality its attack against the verdict in this case is based upon the size of the verdict. As indicated above, such attack will not lie in this Court.

In *Foster* v. *Thornton,* 125 Fla. 699, a later case than those considered above, the Trial Court permitted a verdict of $10,670 damages for wrongful death of a housewife where no accumulation of estate was shown. On appeal the defendant contended that the verdict was excessive. It was held, however, as indicated in the excerpt of this opinion quoted under Point I above, that there is no set criterion for fixing an award in cases of this nature other than the conscience of the jury, and as long as the amount

assessed is not called shocking or unreasonable it will not be disturbed. The Trial Court has found that the verdict was not shocking and if disturbed would only "be substituting my own finding of fact for that of the jury" (R. f. 842).

From the foregoing it is apparent that the jury was properly charged concerning the Florida law of damage in cases of this nature, and the verdict and judgment entered thereon are not contrary to the law of Florida.

POINT III

The trial of this action was properly conducted by the District Judge and there was no departure from the usual course of judicial proceedings.

Under its Point III the petitioner complains of the following:

> "The Court: I will take judicial notice that the side away from her was the left side, and that is the side on which the truck fell.
> Mr. Thielmann: She didn't say that.
> Mr. Hoberman: She did.
> The Court: Did you not say that the truck fell on the side of it which was away from you?
> The Witness: Yes, sir" (R. f. 272).

All eyewitnesses state that Mrs. Youngs was traveling in a southerly direction on the southbound lane. Her testimony is that the petitioner's truck was passing on her left (R. ff. 208-210). In colloquialism she was therefore on "her" side, or right side, of the highway; and if the truck proceeding in the same direction tipped over on the opposite side as it was passing her the truck must have tipped over on its left side. It is thus apparent that the Court could take judicial notice that the side away from her, or the opposite side, was the left-hand side. As

to the balance of the statement by the Court, "and that is the side on which the truck fell", it is equally apparent that this is reference to the side on which Mrs. Youngs said it fell.

Mrs. Youngs, immediately prior to the foregoing statement of the Trial Court, on cross-examination testified as follows:

> "Q. Please—may I have an answer, please? Which side did the truck tip over on? A. On the opposite side from which I was.
> Q. Which side of the truck went to the ground, may I ask you? A. The opposite side from which I was" (R. f. 272).

That petitioner's trial counsel also understood Mrs. Youngs to mean the left side is clear from his examination immediately thereafter:

> "Q. Then, Mrs. Youngs, as I understand it now, it is definitely your testimony that this truck fell over? A. Oh, surely.
> Q. On the side farthest from you, which we will say is the left-hand side? A. Yes" (R. f. 273).

It is quite clear from the foregoing that the Trial Court acted entirely within its province in making the statement complained of. In any event it is difficult to understand petitioner's assertion that the Court's statement decided "as to how the accident occurred". The Trial Court clearly and distinctly charged the jury that there was a disputed question of fact, and that the jury was the sole judge of the facts (R. ff. 743, 744). There was therefore no departure from the usual course of judicial proceedings.

POINT IV

The Circuit Court of Appeals did not err in its decision as to the charge of the District Court.

The petitioner urges that two errors were committed in the charge. The first error alleged is that the main charge of contributory negligence was not complete. The record indicates that petitioner's counsel requested the Trial Court to charge more fully on the subject of contributory negligence (R. ff. 764-766).

The following colloquy took place between Court counsel and petitioner's counsel:

> "The Court: All right, I will charge in the language of the Supreme Court of Florida for you. How will that do?
> Mr. Thielmann: I don't know what it is" (R. f. 765).

The Trial Court thereafter specifically charged exactly as promised: He quoted the definition of contributory negligence verbatim from the most recent decision on the subject by the highest Court of Florida, *Shayne* v. *Saunders*, 176 So. 495 (R. f. 772). (Note: The citation in the record given by the Trial Court—160 So. 495—is incorrect.)

Assuming arguendo there was error in the record in respect to the Court's charge on contributory negligence, surely the charge to the jury verbatim of the definition of contributory negligence made by the highest Court of Florida completely cured any possible error on this score.

Petitioner also urges that it was error for the District Court to charge that proximate cause was not important in this case. Immediately after explaining proximate cause the Trial Court stated that the stories told by respondent's and petitioner's witnesses, respectively, were so divergent that the law of proximate cause was not so important in this case as in other cases (R. f. 754). Petitioner urges that this statement is error.

It is respectfully submitted that the charge was entirely proper. If Mrs. Youngs' version was believed, proximate cause was not important; clearly the act of petitioner's driver in pulling out of his lane into the opposite or northbound lane was the sole cause of the accident. If the versions of Bailey and Dollar, respectively petitioner's driver and his helper, were credited, proximate cause was similarly unimportant because the deceased's act in driving partially on the southbound lane would be the sole cause of the accident. Thus proximate cause did not play as important a role in this case as it frequently does in other negligence cases.

However, the entire matter is trivial, for the alleged error, if any there be, was cured. On petitioner's exception (R. f. 759) the Trial Court subsequently charged that one of the important matters for the jury to determine was proximate cause of the accident; he then defined proximate cause and stressed again that it was important for the jury to determine proximate cause of the accident, because the respondent could not recover unless the jury found that the proximate cause of the accident was petitioner's negligence (R. ff. 770-771). Surely the subsequent charge completely cured any possible error with respect to the original charge concerning proximate cause.

Wherefore, respondent prays that the petition for a writ of certiorari from this honorable Court to the United States Circuit Court of Appeals for the Second Circuit to review this cause, be denied with costs.

Respectfully submitted,

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